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July 20, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 9, 2009

Case Number: TSO-0732

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual's suspended access authorization should not be restored.
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I. BACKGROUND

The individual has been employed by a DOE contractor since 1998, and has held a DOE security clearance since 1999. In 2007, the DOE identified issues of concern relating to the individual's finances, gambling, and factual omissions concerning gambling counseling. In June 2008, the DOE conducted a Personnel Security Interview (the 2008 PSI) with the individual. DOE Exhibit 5. In August 2008, the

1/ Decisions issued by the Office of Hearings and Appeals (OHA), with names and other personal identifying information deleted, are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at <http://www.oha.doe.gov/search.htm>.

individual was evaluated by a DOE-consultant psychiatrist (the DOE-consultant Psychiatrist), who issued a Report of Psychiatric Examination (the "2008 Report") setting forth his conclusions and observations. DOE Exhibit 3.

In January 2009, the Personnel Security Manager of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual stating that his access authorization had been suspended pending the resolution of certain matters. DOE Exhibit 1. Enclosure 2 to this letter, which is entitled "Information Creating a Substantial Doubt Regarding Eligibility for Access Authorization," states that the individual's behavior has raised security concerns under Section 710.8(f) and (1) of the regulations governing eligibility for access to classified material (Criteria F and L).

With respect to Criterion F, the Operations Office finds that information in its possession indicates that the individual has deliberately misrepresented, falsified, or omitted significant information from a Questionnaire for National Security Positions (QNSP). Specifically, on July 17, 2006 he signed a QNSP certifying that he has not consulted with a mental health care provider in the previous seven years. However, during his 2008 PSI, he admitted that in approximately 2005 he attended counseling through the Employee Assistance Program (EAP) for his gambling problem.

The Operations Office finds with respect to Criterion L that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy. First, the DOE finds that the individual failed to report his two 2007 bankruptcy filings to the DOE within the required reporting time, and that he admitted that he exercised poor judgment in not reporting these filings as the DOE required.

Next, the Operations Office finds that in his 2008 Report, the DOE-consultant Psychiatrist concludes that the individual meets the DSM-IV TR criteria for Pathological Gambling. In addition, the Operations Office finds that the individual has admitted that he is unable to cut back or control the amount of gambling that he does, that his relatives expressed concern about his gambling in 2005, and that gambling helps him escape emotional discomfort caused by his being away from his son. It also finds that the individual admitted to writing fraudulent checks in order to finance his gambling, that he admitted that he is unable to live within his means because he gambles away his income, that he has returned to gambling in an attempt to recover his losses, and that he has experienced remorse after gambling as the money he gambled should have been used to pay his bills. Despite acknowledging that he has a gambling problem that has affected his life significantly and

seeking treatment through Gamblers Anonymous and the EAP, the Operations Office finds that the individual admits that he continues to gamble excessively.

Finally, the Operations Office refers to information regarding the individual's financial difficulties attributable to his gambling compulsion. It finds that the individual admits to filing Chapter 13 Bankruptcy twice in 2007 because of debt caused by his gambling compulsion, and that both of these bankruptcies were later dismissed due to non-payment. It finds that the individual admits that he currently owes the Internal Revenue Service (IRS) \$33,000 for outstanding federal tax debts, that he currently owes the State of California over \$17,000 for outstanding state tax debts, and that he currently has approximately \$65,000 in other debts resulting from his gambling compulsion. The Operations Office also finds that he admits to losing approximately \$80,000 gambling in his lifetime, that he admits that he withdrew funds from his retirement account in November 2007 to satisfy his outstanding debts and then used \$20,000 of the withdrawn funds to gamble, and that he admitted to filing Chapter 7 Bankruptcy in 1995 because of excessive credit card debt. See Enclosure 2 to Notification Letter, DOE Exhibit 1.

II. *THE MAY 2009 HEARING*

At the individual's request, a hearing was convened in May 2009 to afford him an opportunity to submit information to resolve these concerns. At the hearing, testimony was received from eight persons. The DOE presented the testimony of the DOE-consultant Psychiatrist. The individual testified and presented the testimony of his current EAP counselor (the EAP Counselor), his Gamblers Anonymous sponsor (the GA Sponsor), a Tax Relief Firm representative, his supervisor, a co-worker, and his brother.

The hearing testimony focused on (i) the individual's explanation for his inaccurate response on his 2006 QNSP, (ii) his failure to inform the DOE of his 2007 bankruptcy filings in a timely manner, (iii) the opinions of the DOE-consultant Psychiatrist and the EAP Counselor concerning the individual's efforts to rehabilitate himself from his gambling addiction, and (iv) the individual's efforts to mitigate his financial issues.

III. *APPLICABLE STANDARDS*

A DOE administrative review proceeding under this Part is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of

case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a presumption against granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security test" for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing*, Case No. VSO-0002 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing*, Case No. VSO-0005 (1995), *aff'd*, Case No. VSA-0005 (1995). See also 10 C.F.R. § 710.7(c).

IV. ANALYSIS OF TESTIMONY AND FINDINGS

A. Criterion F and Criterion L Information Disclosure Concerns

False statements by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. See e.g. *Personnel Security Hearing*, Case No. VSO-0281 (1999), *aff'd*, Case No. VSA-0281 (2000) (terminated by Office of Security Affairs, 2000).

As noted above, in July 2006, the individual signed a QNSP certifying that in the previous seven years, he had not consulted with "a mental health care professional (psychiatrist, psychologist, counselor, etc.)" or "another health care provider

about a mental health related condition." July 2006 QNSP at 26, DOE Exhibit 8. However, at a September 2006 Personal Subject Interview, the individual stated to an Office of Personnel Management (OPM) investigator that, in 2005, he had about eight counseling sessions with an EAP counselor concerning his problem with gambling. He stated to the OPM investigator that one of his reasons for ending these counseling sessions was that he felt they might negatively impact his security clearance. 2006 Personal Subject Interview notes at 3, DOE Exhibit 9. At his 2008 PSI, he stated that he did not report this counseling on his QNSP because he did not realize that he needed to report counseling about a gambling problem. 2008 PSI at 25-26. He also stated that he no longer believes that EAP counseling can jeopardize his clearance, and that it was "poor judgment on my part" to discontinue the counseling. 2008 PSI at 24-25.

In his testimony at the hearing, the individual stated that when he completed his 2006 QNSP, he did not believe that the counseling that he had received in 2005 concerning his gambling problem was treatment for a mental health condition. He testified that he associated mental problems with the severe conditions suffered by his mother, and that he viewed the EAP counselor as just a counselor, not a mental health professional. He also stated that he viewed the EAP as a place to go to get information on problems "or just to talk about things they had like stress relief." He explained that because he did not go to a "mental health clinic", but used a workplace resource, he felt that he could answer "no" to the QNSP question about mental health consultations. He testified that he now understood that he has a counseling relationship with his current EAP counselor. TR at 156-157. His current EAP Counselor provided support for these assertions in her hearing testimony. She stated that "it is not uncommon" for some employees not to understand that EAP counseling needs to be reported when the security questionnaire asks for counseling about a mental health condition. She also stated that she believed that the individual honestly believed that counseling about gambling did not fit into the category of a mental health condition covered by the QNSP question. TR at 62-65. The DOE-consultant Psychiatrist testified that the individual's interpretation of the QNSP question may have been influenced by denial concerning the severity of his gambling problem, and that he was inclined to accept the individual's assertion that his erroneous interpretation of the question was not intentional. TR at 175.

Based on this testimony, I find that there is evidence that the individual honestly believed he was not required to report his 2005 EAP counseling on his July 2006 QNSP. In addition, the fact that he appears to have discussed this counseling with the OPM investigator in September 2006 seems to support the position that

he did not deliberately attempt to deceive the DOE concerning his medical history. Finally, the individual's co-worker and his supervisor both testified that the individual has been honest and forthcoming in his interactions with them. TR at 15-16, 23, 25-26. Accordingly, I conclude that the individual has mitigated the DOE's concern under Criterion F that he deliberately misrepresented, falsified, or omitted significant information from his 2006 QNSP when he answered "no" to the question about mental health consultations.

The Notification Letter issued to the individual also identifies as a Criterion L concern that he failed to report his two 2007 bankruptcy filings to the DOE within the required reporting time. At his 2008 PSI, the individual acknowledged his mistake in this regard, and explained that when he read the requirement for reporting bankruptcy filings, he erroneously interpreted the reporting requirement as applying only to business bankruptcies. 2008 PSI at 26. Especially in light of his 2006 misinterpretation of the QNSP mental health consultations question, this explanation raises a concern that the individual rationalized or evaded a requirement to provide the DOE with negative information concerning his eligibility for access authorization. As I stated to the individual at the outset of the hearing, an affirmative finding regarding eligibility for access authorization is possible only for individuals who cooperate by providing full, frank and truthful answers to the DOE's relevant questions. TR at 9.

The record in this proceeding indicates that the individual reported his 2007 bankruptcy filings to the DOE in May 2008. DOE Case Evaluation Sheet at 3, DOE Exhibit 11. Since that time, the individual has been forthcoming in reporting both derogatory financial information and his gambling relapses to the DOE. As discussed above, the individual's EAP counselor, the DOE-consultant psychiatrist, his supervisor and his co-worker testified that the individual is basically honest and reliable. During this hearing proceeding, I have been impressed with the individual's candor in discussing his derogatory information. Accordingly, I find that since May 2008 through the date of the hearing, the individual has been open and honest with the DOE in reporting and discussing derogatory information, a period of approximately one year. Based on the record of candor that the individual has established in the past year, I find that the individual has mitigated the concerns raised by his failure to report his 2007 bankruptcy filings to the DOE in a timely manner.

B. Criterion L Concerns Relating to Pathological Gambling

1. The Individual's Diagnosis of Pathological Gambling and His Assertions Concerning his Recovery Efforts

In his 2008 Report, the DOE-consultant Psychiatrist found that the individual met the DSM-IV TR criteria for Pathological Gambling. In her testimony at the hearing, the individual's EAP counselor agreed with the findings in that Report. TR at 38. In his testimony at the hearing, the individual did not challenge these findings, and acknowledged that he has a serious gambling problem. TR at 156. Accordingly, I accept the diagnosis of Pathological Gambling for the individual. I also find that it was reasonable for the DOE to conclude that the individual's compulsive gambling addiction could impair his judgment and reliability and prevent the individual from safeguarding classified matter or special nuclear material, thereby raising a Criterion L concern.

At the hearing, the individual testified concerning his past and present recovery efforts for his pathological gambling. He stated that he initially attended Gamblers Anonymous (GA) meetings from 2002 until early 2006, and that he was completely abstinent from gambling for two years of that period. He stated that he began gambling again in November 2006. TR at 87-89. In October 2008, he began meeting with his current EAP counselor about his gambling problem. TR at 31. In March 2009, he began attending GA meetings again, and in April 2009 he acquired his GA sponsor. He stated that he has had two gambling relapses since he began his current EAP counseling in October 2008. One relapse occurred in November 2008, and another in early April 2009. Both of the gambling relapses occurred when the individual entered a card room attached to the bowling alley where he regularly bowls. In both instances, he gambled small amounts of money. During the April 2009 relapse he gambled \$20. TR at 68, 69. He testified that he now attends a GA meeting regularly on Tuesdays, and will begin to attend another GA meeting regularly on Fridays as well, because he has ended a bowling league commitment that interfered with his regular attendance at this Friday meeting. TR at 92-93. He stated that he intends to use his sessions with the EAP counselor to understand and address his compulsion to gamble. He testified that he intends to refrain from gambling in the future, and that he also will refrain from visiting card rooms and casinos. 2/ TR at 159-160.

2/ He stated that he is an avid bowler and participates in a bowling pool where players contribute \$5 and the person with the
(continued...)

2. Evidence and Analysis Concerning the Individual's Efforts

The individual's GA sponsor testified that he knew the individual when the individual attended GA meetings for a couple of years beginning in late 2003. He stated that during those years, the individual participated very well in group sessions on a weekly basis. TR at 73. He stated the individual apparently got "sidetracked", stopped attending the meetings, and slipped back into gambling. He stated that many people leave the GA program thinking that they no longer need it. TR at 74, 81. He testified that now that the individual is back in the program, he has a good chance for success. TR at 81. He stated that the individual is starting to realize that a gambling addiction is not a curable disease, and that it takes a daily commitment for a compulsive gambler not to gamble. TR at 76. He stated that he has been the individual's sponsor for about a month and a half, and that they communicate mainly by phone because he does not usually attend the individual's regular meeting. TR at 74-76. He stated that he and the individual are working one-on-one through the twelve steps of the program, and that they are currently working on step two. TR at 75, 80.

The individual's EAP Counselor, who is a psychologist, testified that the individual first came to her in October 2008, that they have met on a regular basis since then, and that they are now meeting every two or three weeks. TR at 32, 47. She stated that she believes that the individual is trying to do what he needs to do to refrain from gambling, and that he has been very forthcoming in discussing his problem with her. She stated that she believes that the individual has had only two gambling relapses since October 2008, that occurred in November 2008 and early April 2009. TR at 35-37, 49. She stated that these relapses were controlled, because the individual left the card room after losing a set amount of money (\$40 in November and \$20 in April), even though he knew that the proprietor would loan him additional money. TR at 36, 49-50. She testified that the individual has a gambling addiction, and that one to two years without a gambling relapse is an important time frame for establishing a long-term success rate. TR

2/ (...continued)

low score wins the pot. He stated that the pool is for competition and fun, and does not cause him to want to gamble. TR at 60, 160. The EAP Counselor stated that the individual's bowling competitions are an acceptable social outlet for the individual, and the DOE-consultant Psychiatrist agreed. TR at 61, 166.

at 47. She stated that the individual's intent is not to gamble, but there are moments when he succumbs. She estimated that his risk for relapse in the next year is medium to low. TR at 50-51, 60. She testified that, in her opinion, an occasional gambling relapse such as the individual's April 2009 relapse is not as serious as an alcohol or drug relapse, because there is no issue of reviving a physical craving for alcohol or drugs. TR at 59. She stated that the individual's current commitment to controlling his gambling should be adequate to resolve any security concerns about his gambling behavior, and that it is unnecessary for the DOE to require a "very positive" clinical prognosis based on one or two years of abstinence from gambling activity. TR at 57-59.

The DOE consultant-psychiatrist testified after listening to the testimony of all the other witnesses at the hearing. He stated that he agreed with the individual's counselor that one to two years of abstinence from gambling is really needed to improve the likelihood that the individual will not have a gambling relapse. He testified that presently there is a "realistic and moderate" risk the individual will relapse and gamble in the coming months. TR at 165-166. He stated that while he agreed with the individual's EAP Counselor, that the individual's gambling problem does not interfere with the individual's judgment and reliability in the workplace, it has created a serious problem in his life concerning his ability to manage his finances that results in an enormous amount of emotional stress. TR at 167, 168. He concluded that the individual has made "some decent progress" towards controlling his pathological gambling, but that it is still "very early" in that process, because the individual only recently rejoined GA, is only working on Step 2 of GA with his sponsor, and because he has not yet been abstinent from gambling for any substantial time. He stated that when the individual has been abstinent from gambling for 12 to 24 months, he would have more confidence that this problem "is mostly behind him". TR at 168.

The record is clear that the individual is taking positive steps to arrest his compulsive gambling, and I find his actions in this regard to be highly commendable. After listening to the testimony of his GA sponsor and his EAP Counselor, I conclude that the individual has enlisted the necessary support to address this problem, and is making a sincere effort to understand and control his gambling addiction through the GA program and through personal therapy. Despite these positive factors, I agree with the EAP Counselor and the DOE-consultant Psychiatrist that the individual is not rehabilitated from his pathological gambling. In light of the individual's previous unsuccessful efforts to control his gambling, I find that it is reasonable for these professionals to

require one to two years of abstinence from gambling before they can find him rehabilitated from his pathological gambling diagnosis. The individual's most recent gambling relapse was in early April 2009, a little more than a month before the hearing. I believe this supports the finding of the DOE-consultant psychiatrist that the individual continues to have a moderate risk of gambling in the next year. I also agree with the DOE-consultant Psychiatrist's finding that the individual's pathological gambling negatively affects his ability to responsibly manage his finances, which is a serious security concern under Criterion L. I reject the EAP Counselor's assertion that the individual's occasional gambling relapses involving small amounts of money should not be of concern to the DOE. As discussed below, the individual's financial situation is so poor that even small amounts of gambling losses could substantially impact his financial situation. Accordingly, I conclude that the individual is not yet rehabilitated or reformed from his pathological gambling, and that he has not yet mitigated the Criterion L security concerns relating to his gambling behavior.

C. Criterion L Concerns Regarding Financial Irresponsibility

The record establishes that the individual's gambling has had a negative impact on his finances. Financial problems resulting from a person's gambling are precisely the conduct or circumstance that "furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of national security" under Criterion L. *Personnel Security Hearing, Case No. VSO-0041 (1995), aff'd, Personnel Security Review, VSA-0041 (1996) (affirmed by OSA, 1996)*. While it may well be true that the individual has not, to date, succumbed to any pressure, coercion, or exploitation because of his financial difficulties, the risk is too great to ignore. Given the facts of this case, I find that the DOE was clearly justified in invoking Criterion L when it suspended the individual's security clearance.

To mitigate the DOE's Criterion L concerns, the individual states that he has reduced his monthly living expenses and has hired a tax relief firm (the Tax Relief Firm) to negotiate settlements of his outstanding tax debts to the Internal Revenue Service and the State of California. Prior to the hearing, the individual submitted a May 2009 Credit Report and an estimated monthly budget. At the hearing, the Tax Relief Firm representative testified that individual was their client and that they were in the process of negotiating with the IRS and California to settle those debts. He stated that the individual's current outstanding debt to the IRS is

\$33,000. TR at 99-101. In a post-hearing filing received on June 2, 2009, the individual stated that he had not yet heard from the Tax Relief Firm concerning the outcome of those settlement negotiations. 3/

Previous opinions issued by OHA Hearing Officers have held that once there is a pattern of financial irresponsibility, the individual must demonstrate a sustained, new pattern of financial responsibility for a period of time that is sufficient to demonstrate that a recurrence of the past pattern is unlikely. *Personnel Security Hearing*, Case No. VSO-0108 (1996); *Personnel Security Hearing*, Case No. VSO-0240 (1999). After reviewing all the evidence in the record, I find that the individual has not yet finished the process he started of straightening out his financial affairs. According to his testimony at the hearing, the individual acknowledged that he had outstanding debts on his current credit report totaling \$67,501. TR at 143. His June 2, 2009, submission indicates that an IRS lien of \$8,371.75, which was included in this total, has been paid. The individual asserted that a delinquent real estate account balance of \$56,494, which was also included in this total, should only be \$14,000 because the rest of the debt was discharged when the property was foreclosed. TR at 142. However, the individual has not documented this assertion.

Even if the individual's real estate debt was shown to be only \$14,000, he still would not be able to establish that he is financially stable. In addition to his unpaid tax debt of \$33,000 discussed above, the individual testified that the State of California continues to garnish his wages to pay back taxes. With this garnishment, his monthly income after the garnishment is \$1,900, while his monthly expenses total \$3,496. TR at 152-153. The individual stated that he hopes to give up his apartment and rent a room near his workplace, which will significantly reduce his monthly expenses. TR at 153. It is clear from the individual's testimony that he remains deeply in debt, and that his monthly expenses exceed his income. Under these circumstances, I conclude

3/ In this filing, the individual also submitted a Certificate of Release of Federal Tax Lien dated February 13, 2008, which indicates that a November 2007 IRS tax lien of \$8,371.75 for tax owed from the individual's 2006 Form 1040 had been satisfied, and the tax lien had been released.

that the individual has not mitigated the Criterion L financial concerns identified in the Notification Letter. 4/

V. CONCLUSION

For the reasons set forth above, I find that the DOE properly invoked Criteria F and L in suspending the individual's access authorization. After considering all of the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has mitigated the DOE's Criterion F concern and its Criterion L concern relating to the individual's failure to report his bankruptcy filings to the DOE in 2007. I further conclude that the individual has not mitigated the remaining Criterion L concerns identified by the DOE. Accordingly, I cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. It is therefore my conclusion that the individual's access authorization should not be restored at this time. The individual or the DOE may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: July 20, 2009

4/ Even if the individual had demonstrated that his finances were in order at the time of the hearing, I would have been reluctant to find that he had mitigated the Criterion L financial concerns. Sufficient time would not have passed for me to predict whether the individual would remain financially responsible, or whether he would resume his past pattern of financial irresponsibility. I am also mindful that the individual's future financial stability is predicated on his recovery from his compulsive gambling disorder. Until that recovery process is complete, it would be difficult for me to find that the individual has mitigated the DOE's security concerns attendant his financial irresponsibility. See *Personnel Security Hearing*, Case No. VSO-0244 (1999).